Bankruptcy States Bound by Arbitration Clauses in Board Contracts: Eastern High Court ruling (U 2025.3540 Ø)

Taking Director and management liability disputes are often lengthy, complex, and commercially sensitive. In that capacity, the ruling U 2025.3540 Ø is a timely reminder that dispute resolution clauses in board contracts can be fully effective - also in insolvency scenarios.

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The Case and the High Court’s Decision

A bankruptcy estate brought a court claim of approximately DKK 25 million before the District Court against two former board members under section 361(1) of the Danish Companies Act.

The defendants sought dismissal of the case and relied on identical arbitration clauses in their board service contracts, providing that any dispute ‘arising out of or in connection with’ the agreement should be resolved by arbitration administered by the Danish Institute of Arbitration, seated in Copenhagen, with the proceedings conducted in English.

After an overall assessment, the District Court found that the legal basis invoked for the bankruptcy estate’s claim was so closely connected with insolvency-related matters that the bankruptcy estate was not bound by the arbitration agreement entered into between the board members and the company with respect to the claim raised bankruptcy estate.

The decision was appealed to the Eastern High Court, which found that the liability assessment to be carried out in respect of the board members pursuant to section 361(1) of the Danish Companies Act could be made independently of the bankruptcy. Regardless of the significance of the dispute's outcome for the bankruptcy estate, the Eastern High Court therefore found no basis for concluding that the arbitration clauses - which, according to their wording, covered the present claim for damages - were inapplicable. The dispute was therefore to be resolved by arbitration in accordance with the board contracts, and the case was consequently dismissed by the courts.

The Eastern High Court's decision has been appealed.

Why the Ruling is Interesting

The ruling is interesting because it confirms that arbitration clauses in board member agreements may remain effective even where a claim is brought by a bankruptcy estate rather than by the company, its shareholders, or a third party. The fact that the plaintiff is a trustee acting on behalf of creditors does not in itself deprive an otherwise applicable arbitration clause of effect.

In doing so, the decision clarifies that, in certain circumstances, a bankruptcy estate may be required to assume the company's contractual position for the purposes of dispute resolution. Where a claim against board members is assessed on ordinary substantive liability grounds and is not of a distinct insolvency-law character, the estate may therefore be required to pursue the claim by arbitration in accordance with the pre-insolvency arbitration agreement.

This decision is therefore important, as it provides legal certainty for board members, who are frequently faced with liability claims brought by bankruptcy estates. It further emphasises the practical importance of carefully negotiated arbitration clauses in board agreements.

Practical Takeaways

When drafting board member agreements, companies can validly agree on arbitration as the dispute-resolution mechanism and may take comfort in the fact that such clauses can remain effective even if the company later enters into bankruptcy. As a result, potential disputes with board members may still be resolved confidentially through arbitration, notwithstanding that the claim is brought by a bankruptcy estate rather than by the company itself.

That said, arbitration will not necessarily be the optimal solution in all director liability scenarios. Such disputes often involve multiple parties such as auditors, advisers, or insurers, who may not be bound by the arbitration clause in the board agreement. This creates a risk of parallel proceedings, with related claims being pursued simultaneously in arbitration and before the ordinary courts, potentially increasing costs, complexity, and the risk of inconsistent outcomes.

Accordingly, while arbitration clauses in board member agreements can be an effective risk-management tool, their suitability should be carefully assessed in light of the company's broader governance structure and the likelihood of multi-party disputes.

If you have any questions or require further information regarding any of the above, please do not hesitate to contact us.

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